Tenaga Nasional Bhd v Bukit Lenang Development Sdn Bhd

COURT OF APPEAL (PUTRAJAYA) — CIVIL APPEAL NO J-02–2091 OF 2011
HISHAMUDIN YUNUS, LINTON ALBERT AND VERNON ONG JJCA
29 OCTOBER 2014

Civil Procedure — Appeal — Application to produce new evidence — Respondent commenced action in trespass against appellant — Trial court found in favour of respondent — Appellant appealed against decision — Respondent sought to produce new evidence — Whether litigation privilege applicable to exclude admission of detailed survey plan — Whether conditions for admission of further evidence have been satisfied

The respondent was the owner of 407 plots of land intended for development. Nevertheless, the development did not materialise due to the fact that the plots were illegally occupied by squatters. At the same time, the appellant supplied electricity to the squatters. Consequently, the respondent had commenced action against the squatters ('the squatter action') and obtained judgment against them. Subsequent to the squatter action, the respondent commenced action against the appellant for trespass and the High Court allowed the claim. Hence, this appeal. In the present appeal, pursuant to r 7(2), (3) and (3A) of the Rules of the Court of Appeal 1994 ('the RCA') and s 69(2) of the Courts of Judicature Act 1964 ('the CJA 1964'), the respondent vide encl 37a applied for leave to adduce further evidence which include a detailed survey plan prepared by firm of Ahmad Rustami ('DW11'), a list of 62 squatters produced by the appellant and an affidavit verifying the said list. The respondent submitted that r 7(3A) of the RCA was satisfied because: (a) the respondent could not have with any reasonable diligence obtained the said documents prior to judgment; (b) the evidence was credible as it was the appellant's own evidence; and (c) the evidence was clearly likely to have a determining influence on the central question of trespass. In reply, the appellant submitted that the detailed survey plan was protected by litigation privilege as it was created for the purposes of litigation. The appellant also submitted that the respondent did not exercise reasonable diligence in obtaining the evidence prior to the trial in the High Court. The issues for consideration were: (i) whether litigation privilege was applicable to exclude the admission of the detailed survey plan; and (ii) whether the conditions for admission of further evidence have been satisfied.

Held, allowing encl 37a with costs:

(1) The appellant's reliance on litigation privilege at common law was misconceived. By virtue of s 3 of the Civil Law Act 1956, the common

law position is displaced by s 126 of the Evidence Act 1950 ('the EA 1950'). Section 126 is the only section that deals with legal professional privilege. The court was of the view that the privilege codified by s 126 of the EA was not litigation privilege. Further, the detailed survey plan contained facts relating to the appellant's infrastructure on and over the respondent's lands. These facts went to the core of the issue of trespass. Facts which are conveyed in communications subject to litigation privilege are not privileged (see paras 31–32).

(2) Based on the facts, the court satisfied that the respondent could not have with any reasonable diligence obtained the said documents prior to judgment because prior to judgment the appellant had created the clear impression that there was no detailed survey plan. Further, notwithstanding the appellant's unequivocal stand that it could not identify the persons it supplied electricity to, the appellant had in fact produced a list of 62 squatters in the squatter action that it admitted to having supplied electricity to. The court also satisfied that the detailed survey plan, the list of documents and the affidavit verifying list of documents were if true, would have or would have been likely to have had a determining influence upon the decision of the High Court (see para 35).

(3) In all the circumstances the appellant had for all intents and purposes suppressed the existence of the detailed survey plan and the names of the squatters supplied with electricity from the High Court. In the circumstances, the court would favour a more liberal approach to the adducing of the new evidence (see para 36).

[Bahasa Malaysia summary

Responden merupakan pemilik 407 plot tanah yang dicadangkan untuk pembangunan. Walau bagaimanapun, pembangunan tersebut tidak menjadi kenyataan kerana plot-plot tersebut telah diduduki secara haram oleh penduduk setinggan. Pada masa yang sama, perayu membekalkan bekalan elektrik kepada penduduk setinggan. Sehubungan dengan itu, responden telah memulakan tindakan terhadap penduduk setinggan ('tindakan penduduk setinggan') dan memperoleh penghakiman terhadap mereka. Selepas tindakan penduduk setinggan, responden memulakan tindakan terhadap perayu kerana menceroboh dan Mahkamah Tinggi membenarkan tuntutan itu. Oleh itu, rayuan ini dibuat. Dalam rayuan ini, menurut k 7(2), (3) dan (3A) Kaedah-Kaedah Mahkamah Rayuan 1994 ('KMR') dan s 69(2) Akta Mahkamah Kehakiman 1964 ('AMK 1964'), responden melalui lampiran 37a memohon untuk kebenaran mengemukakan keterangan lanjut termasuk pelan kajian terperinci yang disediakan oleh firma Ahmad Rustami ('DW11'), senarai 62 orang penduduk setinggan dikeluarkan oleh perayu dan afidavit yang menentusahkan senarai tersebut. Responden berhujah bahawa k 7 (3A) KMR telah dipenuhi kerana: (a) responden tidak boleh mempunyai, tanpa

sebarang usaha yang munasabah memperolehi dokumen tersebut sebelum penghakiman; (b) keterangan tersebut boleh dipercayai kerana itu adalah bukti perayu sendiri; dan (c) keterangan tersebut berkemungkinan mempunyai pengaruh yang menentukan kepada persoalan utama pencerobohan. Sebagai balasan, perayu berhujah bahawa pelan ukur terperinci telah dilindungi oleh keistimewaan undang-undang kerana pelan ukur terperinci dicipta untuk tujuan litigasi. Perayu juga berhujah bahawa responden tidak melakukan usaha yang munasabah untuk mendapatkan bukti sebelum perbicaraan di Mahkamah Tinggi. Isu-isu untuk dipertimbangkan adalah: (i) sama ada keistimewaan undang-undang terpakai untuk mengecualikan kemasukan pelan ukur terperinci; dan (ii) sama ada syarat-syarat untuk penerimaan keterangan lanjut telah dipenuhi.

Diputuskan, membenarkan lampiran 37a dengan kos:

(1) Pergantungan perayu kepada keistimewaan litigasi undang-undang common law merupakan salah anggapan. Menurut s 3 Akta Undang-Undang Sivil 1956, kedudukan undang-undang common law digantikan oleh s 126 Akta Keterangan 1950 ('AK 1950'). Seksyen 126 adalah satu-satunya seksyen yang berurusan dengan keistimewaan undang-undang profesional. Mahkamah berpendapat bahawa keistimewaan yang termaktub oleh s 126 AK 1950 bukanlah keistimewaan litigasi. Seterusnya, pelan ukur terperinci mengandungi fakta yang berkaitan dengan infrastruktur perayu di dalam dan di atas tanah responden. Fakta-fakta ini berhubung isu pencerobohan. Fakta-fakta yang disampaikan dalam komunikasi tertakluk kepada keistimewaan litigasi adalah tidak dilindungi (lihat perenggan 31–32).

(2) Berdasarkan fakta, mahkamah berpuas hati bahawa responden tidak boleh tanpa sebarang usaha yang munasabah memperolehi dokumen-dokumen tersebut sebelum penghakiman kerana sebelum penghakiman perayu telah memberikan tanggapan jelas bahawa tidak terdapat pelan ukur terperinci. Seterusnya, meskipun perayu berpendirian teguh bahawa dia tidak dapat mengenalpasti individu yang dibekalkan elektrik, perayu sebenarnya mengeluarkan senarai 62 orang penduduk setinggan yang diakuinya telah dibekalkan dengan elektrik. Mahkamah juga berpuas hati bahawa pelan terperinci kaji selidik, senarai dokumen dan afidavit mengesahkan senarai dokumen-dokumen sekiranya benar, akan mempunyai atau berkemungkinan mempunyai pengaruh yang membawa penentuan kepada keputusan Mahkamah Tinggi (lihat perenggan 35).

(3) Dalam semua keadaan perayu telah mempunyai niat dan tujuan untuk mendiamkan kewujudan pelan ukur terperinci dan nama-nama penduduk setinggan yang dibekalkan dengan bekalan elektrik daripada Mahkamah Tinggi. Dalam keadaan ini, mahkamah akan memihak

kepada pendekatan yang lebih liberal kepada mengutarakan bukti baru (lihat perenggan 36).]

Notes

For cases on application to produce new evidence, see 2(1) *Mallal's Digest* (5th Ed, 2015) paras 1034–1037.

Cases referred to

B and others v Auckland District Law Society and another [2003] 2 AC 736, PC (refd)
Chadwick v Bowman [1886] 16 QBD 561 (refd)
Dato' Anthony See Teow Guan v See Teow Chuan & Anor [2009] 3 MLJ 14, FC (distd)
Dr Pritam Singh v Yap Hong Choon [2007] 1 MLJ 31, CA (distd)
Ghouse bin Haji Kader Mustan v Rex [1946] MLJ 36, HC (refd)
Government of the State of Selangor v Central Lorry Service & Construction Ltd [1972] 1 MLJ 102 (refd)
Hamilton v Brodie Brittain Racing Ltd [1995] Lexis Citation 1862, CA (refd)
Harmony Shipping Co SA v Davis and others [1979] 3 All ER 177, CA (refd)
Jayasena v Reginam [1970] 1 All ER 219; [1970] AC 618, PC (refd)
Ladd v Marshall [1954] 3 All ER 745, CA (refd)
L (A Minor) (Police Investigation: Privilege), In Re [1997] AC 16, HL (refd)
Linton v Ministry of Defence [1983] NI 51, HL (refd)
Looi Wooi Saik v Public Prosecutor [1962] MLJ 337, CA (refd)
Mahomed Syedol Ariffin v Yeoh Ooi Gark (1917) 19 BOMLR 157; [1916] 1 MC 165, PC (refd)
PP v Yuvaraj [1969] 2 MLJ 89, PC (refd)
R v Derby Magistrates' Court, ex parte B; and another appeal [1995] 4 All ER 526; [1996] 1 FLR 513, HL (refd)
Skone v Skone and another [1971] 2 All ER 582, HL (refd)
Three Rivers District Council and others v Governor and Company of the Bank of England (No 6) [2005] 1 AC 610, HL (refd)
Wheeler v Le Marchant [1881] 17 Ch D 675, CA (refd)

Legislation referred to

Civil Law Act 1956 s 3
Courts of Judicature Act 1964 s 69(2), (3)
Evidence Act 1950 ss 126, 129
Evidence Act 1872 [IND]
Rules of the Court of Appeal 1994 r 7(2), (3), (3A)
Rules of the High Court 1980 O 34 r 4(2)(j)

Appeal from: Civil Suit No MT-22–766 of 2007 (High Court, Johor Bahru)

Cyrus Das (Steven Thiru, Balvinder Singh, Gurmel Singh and Gregory Das with

him) (Balvinder Singh Kenth) for the appellant.
Malik Imtiaz Sarwar (Mathew Thomas Philips, BN Thamodaran, Pavendeep Singh and Clinton Tan with him) (Thomas Philip) for the respondent.

Vernon Ong JCA:

INTRODUCTION

[1] On 29 October 2014, we allowed the respondent's application in encl 37a for leave to adduce further evidence pursuant to r 7(2), (3) and (3A) of the Rules of the Court of Appeal 1994 ('the RCA') and s 69(2) of the Courts of Judicature Act 1964 ('the CJA 1964'). Our grounds of decision are as follows.

THE SALIENT BACKGROUND FACTS

[2] The respondent sued the appellant for trespass. The respondent was at the material time the owner of 407 lots of land which were for all intents and purposes treated as one large plot of land for development purposes. The previous owner of the lots had caused the subdivision of the former master title with a view to development. This development did not materialise due to the plots be illegally occupied by squatters. At all material times, the respondent was similarly impeded by the said squatters.

[3] The appellant had supplied electricity to the squatters and had erected electrical poles, supply lines and meters on and over the lands in question to the illegal residences of the squatters.

[4] The respondent had commenced proceedings against the squatters ('the squatter action') in Johor Bahru Suit No 22–480 of 2000 and obtained judgment against them on 28 April 2003. The judgment was affirmed by the Court of Appeal and leave to appeal to the Federal Court was refused.

[5] The respondent then commenced proceedings for trespass against the appellant. The High Court allowed the respondent's claim on 1 July 2011. It is this judgment which is being appealed against ('trespass appeal').

APPLICATION TO STAY HEARING OF ENCL 37a

[6] Vide an application in encl 43a, the appellant sought to stay the hearing of encl 37a pending the hearing of a contempt appeal ('contempt appeal') arising from the same suit.

[7] Learned counsel for the appellant argued that encl 37a ought to be held

over until after the contempt appeal is heard. Enclosure 37a is an application to adduce documents as further evidence in the trespass appeal. It ought to be heard when that appeal is scheduled for hearing. The issue whether the documents in question are protected by litigation privilege ought to be decided in the contempt appeal so that the appellant is not presented with a fait accompli that the detailed survey plan is admitted as evidence in the trespass appeal. Allowing encl 37a to be heard will prejudice the contempt appeal. The contempt appeal is criminal in nature and all opportunity should be given to the alleged contemnors to present their case without having their hands being tied up even before the appeal is heard. In his short reply, learned counsel for the respondent submitted that encl 37a cannot be viewed in isolation.

[8] We agree with learned counsel for the respondent that the application cannot be viewed in isolation and dismissed encl 43a with costs. We then proceeded to hear counsel on encl 37a.

ENCLOSURE 37a — APPLICATION TO ADDUCE FURTHER EVIDENCE

[9] At the outset, learned counsel for the appellant intimated to the court that the appellant was not objecting to the production of documents listed in prayers 1.2 and 1.3 of the application. Accordingly, we heard submission of counsel on the remaining prayers viz, 1.1, 1.4 and 1.5.

[10] For convenience, the documents sought to be adduced pursuant to the aforesaid prayers are as follows:

Prayer	Documents
1.1	Detailed survey plan prepared by firm of Ahmad Rustami.
1.4	Affidavit verifying list of documents affirmed by one Ramonah bt Ramthan on 30 June 2014 pursuant to order dated 3 June 2014 in Civil Suit MT5(2)–22–766–2007.
1.5	List of documents pursuant to order dated 3 June 2014 in Civil Suit MT5(2)–22–766–2007.

SUBMISSIONS OF PARTIES

The respondent's submission

[11] According to learned counsel for the respondent at all material times the appellant took the stand that it was not in a position to determine whether it was in fact supplying electricity to the squatters without being specifically informed of the precise location of the squatters. This was notwithstanding the

appellant having ultimately assisted the respondent in clearing the squatters from the lands by removing electricity poles, cables and meters that had been installed for the purposes of the supply of electricity. In doing so, the appellant had relied on information within its possession.

[12] Prior to the trial of the action, the respondent had repeatedly requested for copies of all documentation pertaining to the supply of electricity to the squatters. The appellant refused to provide the requested documentation on the ground that it was not able to identify the alleged occupiers.

[13] A witness of the appellant, Ahmad Rustami ('DW11') a surveyor testified at the trial that his firm Jurukur Abadi, had been retained by the appellant to obtain a pre-computation plan from the land office to determine the location of the lands in question. In cross-examination he said that neither he nor any of his employees visited the lands for the purposes of their work. The clear impression created was that apart from the pre-computation plan, there was no other survey plan. Another witness of the appellant, Nirinder Singh ('DW3'), however, said that the appellant was in a position to determine the details of those supplied from the computerised billing system that the appellant utilised.

[14] The High Court found on a balance of probability that the appellant had trespassed. The learned judge concluded that the question of the identity of the squatters supplied with electricity by the appellant could be addressed at the assessment of damages.

[15] Since judgment, two critical events have occurred. Firstly, it came to light that a detailed survey plan had in fact been prepared by DW11's firm. Contrary to the stand taken by the appellant, this survey plan, which identifies with precision the location of electricity poles and cable to the illegal residences of the squatters shows that the appellant was clearly aware at all material times which specific lots it was supplying electricity to through the electrical poles and supply lines. This survey plan is the document for which leave is sought in prayer 1.1.

[16] Secondly, in the discovery for the purposes of assessment of damages, the appellant has produced a list of 62 squatters, who were defendants in the squatter action (in which there were 291 defendants), that it admits to have supplied electricity to. This list has been verified by an affidavit affirmed by an officer of the appellant. These two documents are the documents for which leave is sought in prayers 1.4 and 1.5.

[17] Learned counsel submitted that r 7(3A) of the RCA is satisfied because: (i) the respondent could not have with any reasonable diligence obtained the

said documents prior to judgment in view of the position taken by the appellant; (ii) the evidence is credible as it is the appellant's own evidence; and (iii) the evidence is clearly likely to have a determining influence on the central question of trespass.

[18] Lastly, learned counsel submitted that the applicable legal principles favour a more liberal approach in adducing of the further evidence (*Hamilton v Brodie Brittain Racing Ltd* [1995] Lexis Citation 1862; *Skone v Skone and another* [1971] 2 All ER 582; *Linton v Ministry of Defence* [1983] NI 51).

The appellant's submission

[19] Insofar as the detailed survey plan is concerned, learned counsel for the appellant argued that it is protected by litigation privilege as it was created for the purposes of litigation. The survey plan was commissioned by the appellant in response to the filing of the trespass action. If privilege attaches to documents, no question of suppression arises. The two do not coexist. In support of his argument, learned counsel referred to *Dato' Anthony See Teow Guan v See Teow Chuan & Anor* [2009] 3 MLJ 14 (FC); *B and others v Auckland District Law Society and another* [2003] 2 AC 736; *R v Derby Magistrates' Court, ex parte B; and another appeal* [1995] 4 All ER 526; [1996] 1 FLR 513; *Three Rivers District Council and others v Governor and Company of the Bank of England (No 6)* [2005] 1 AC 610; *In Re L (A Minor) (Police Investigation: Privilege)* [1997] AC 16; and *Dr Pritam Singh v Yap Hong Choon* [2007] 1 MLJ 31.

[20] In relation to the documents under prayers 1.4 and 1.5, learned counsel argued that the documents were procured by the respondent by way of discovery application after judgment and in the assessment proceedings. These documents would have been discovered by way of discovery application before the trial. In other words, the respondent did not exercise reasonable diligence in obtaining the evidence prior to the trial in the High Court.

OUR DECISION

[21] We take it as settled law that before an order to admit further evidence can be made the party seeking to use it must satisfy two conditions: s 69(3) of the CJA 1964; r 7(3A) of the RCA; *Ladd v Marshall* [1954] 3 All ER 745. In this case the respondent bears the burden of satisfying the court of the following:

(a) at the hearing before the High Court, the new evidence was not available to the respondent or that reasonable diligence would not have made it so available; and

(b) the new evidence, if true, would have or would have been likely to have had a determining influence upon the decision of the High Court.

[22] However, before considering whether the conditions have been satisfied, we propose to deal with the preliminary question of whether litigation privilege applies to exclude the admission of the detailed survey plan. If the question is answered in the affirmative, then that is the end of the matter: the detailed survey plan is protected and excluded as a matter of course.

[23] The argument of learned counsel for the appellant is premised on the footing that litigation privilege is a form of legal professional privilege and that legal professional privilege is accorded statutory recognition by virtue of ss 126 and 129 of the Evidence Act 1950 ('the EA 1950'). Litigation privilege covers all documents brought into being for the purposes of litigation.

[24] In *Government of the State of Selangor v Central Lorry Service & Construction Ltd* [1972] 1 MLJ 102, the defendants had successfully tendered for certain drainage works for the sum of $172,224.40. As a result of their failure to complete the works, the plaintiff had to invite a second tender. One Soon Tat & Co successfully tendered for the sum of $241,906.40. Consequently, the plaintiff claimed a sum of $113,983.40 alleged to be due from the defendants. The defendants applied for discovery and inspection of the file relating to the second tender, in particular the tender documents of Soon Tat & Co and all the other contractors who also tendered for the second contract. The plaintiff objected to the application except in so far as to the contract and tender documents relating to Soon Fat & Co on the ground of privilege under s 126 of the Evidence Ordinance. Mohamed Azmi J (as he then was) held that the file in question was not privileged under s 126 of the Evidence Ordinance. The affidavit of the plaintiff did not state precisely in what way the plaintiff intends to put the claim for protection. The file relating to the tender documents for the second contract is not confidential communication between solicitor and client. There is no evidence to support that it contains documents which the plaintiff has submitted to its solicitor confidentially or with which the solicitor has become acquainted in the course and for the purpose of his professional employment. In other words, the High Court recognised that the legal professional privilege codified by s 126 of the Evidence Act 1950 is not litigation privilege.

[25] In *Chadwick v Bowman* [1886] 16 QBD 561, it was held that documentary information from third persons not called into existence by the solicitor though obtained by him for purposes of litigation are not privileged.

[26] In this connection, it is also pertinent to refer a passage in *Wheeler v Le Marchant* [1881] 17 Ch D 675 at p 681 where Jessel MR said:

> *In the first place, the principle protecting confidential communications is of a very limited character*. It does not protect all confidential communications a man must necessarily make in order to obtain advice, even when needed for the protection of his life, or of his honour, or of his fortune. There are many communications which, though absolutely necessary, because without them the ordinary business of life cannot be carried on, still are not privileged ... Therefore it must not be supposed that there is any principle which says that every confidential communication which it is necessary to make in order to carry on the ordinary business of life is protected. *The protection is of a very limited character, and in this country is restricted to the obtaining the assistance of lawyers, as regards the conduct of litigation or the rights to property. It has never gone beyond the obtaining legal advice and assistance, and all things reasonably necessary in the shape of communication to the legal advisers are protected from production or discovery in order that legal advice may be obtained safely and sufficiently.* (Emphasis added.)

[27] Be that as it may, we are mindful that litigation privilege was recognised by this court in *Dr Pritam Singh v Yap Hong Choon* [2007] 1 MLJ 31 (CA) where it was held that opinions of medical reports obtained by the plaintiff are the subject of legal professional privilege which are protected against pre-trial discovery. *Dr Pritam Singh* is however, distinguishable for a number of reasons. First, the application related to a pre-trial discovery of documents. Second, the court's decision was premised on the saving provision in O 34 r 4(2)(j) of the then Rules of the High Court 1980 ('the RHC') which enabled the plaintiff to raise a claim for privilege under s 126 of the EA 1950. Third, the court's attention was not drawn to s 3 of the Civil Law Act 1956 ('the CLA 1956') and to the impact of s 126 of the EA 1950 on the common law position.

[28] The EA 1950 was promulgated to define the law of evidence: see short title of EA 1950. The EA 1950 is modelled on the Indian Evidence Act which is a codified form of the English law: per Thomson CJ (as he then was) in *Looi Wooi Saik v Public Prosecutor* [1962] MLJ 337 at p 339 (CA).

[29] A line of authorities have established the principle that the EA 1950 must not be construed against the background of the common law: McElwaine CJ in *Ghouse bin Haji Kader Mustan v Rex* [1946] MLJ 36, at p 37 (HC); per Lord Shaw of Dunfermline in *Mahomed Syedol Ariffin v Yeoh Ooi Gark* (1917) 19 BOMLR 157; [1916] 1 MC 165, at p 168 (PC). Where any part of the law relating to evidence is expressly dealt with by the EA 1950 the courts must give effect to the relevant provisions of the EA 1950 whether or not they differ from the common law rules of evidence as applied by the English courts: *Public Prosecutor v Yuvaraj* [1969] 2 MLJ 89 (PC). So where the EA 1950 contains a rule of evidence which is subsequently changed in an English decision, the rule in the EA 1950 cannot be construed in the light of the common law decision: *Jayasena v Reginam* [1970] 1 All ER 219; [1970] AC 618 (PC).

[30] We have considered the following authorities cited by learned counsel for the appellant. In *Dato' Anthony See Teow Guan*, the defendant's advocate rendered a legal opinion addressed to Kian Joo Can Factory Bhd for the attention of the defendant. The defendant subsequently published the legal opinion to various persons and in due course the plaintiff obtained a copy of the same. The plaintiffs claimed that the legal opinion was defamatory because it contained allegations that the defendants were dishonest and acted in breach of their duties as directors. The plaintiffs at the trial of the defamation suit sought to admit the legal opinion and called the advocate as a witness to answer questions on the legal opinion. The Federal Court held that the legal opinion is a privileged document and once a document is privileged it is always privileged. In that case, the loss of confidentiality does not occasion the loss of privilege because s 126 of the EA 1950 permits only one exception permitted under when privilege no longer applies ie where the client expressly consents to its disclosure. As can be seen, *Dato' Anthony See Teow Guan* is also distinguishable on the facts and on the law. The document in question was a legal opinion and the issue before the court was whether the publication of the legal opinion to third parties gave rise to a loss of privilege to the legal opinion. As with *Dato' Anthony See Teow Guan*, the passages referred to in *R v Derby Magistrates' Court, ex parte B; and another appeal* [1995] 4 All ER 526; [1996] 1 FLR 513, *B v Auckland District Law Society* and *Three Rivers DC* related to legal professional privilege.

[31] In the light of the aforesaid, the appellant's reliance on litigation privilege at common law is misconceived. We agree with the submission of learned counsel for the respondent that by virtue of s 3 of the CLA 1956, the common law position is displaced by s 126 of the EA 1950. Section 126 is the only section that deals with privilege of the kind relied on by the appellant — legal professional privilege. In our view the privilege codified by s 126 of the Evidence Act 1950 is not litigation privilege.

[32] Even if it is assumed that common law privilege is applicable in this case, we take the view that there can be no privilege over material facts. We agree with learned counsel for the respondent that the detailed survey plan contains facts relating to the appellant's infrastructure on and over the respondent's lands. These facts go to the core of the issue of trespass. Facts which are conveyed in communications subject to litigation privilege are not privileged. It is significant that there is no assertion that the detailed survey plan was commissioned or obtained by the appellant's solicitors. Neither was it procured by the appellant for the purposes of obtaining legal advice. The detailed survey plan came into existence as a result of the appellant's own fact finding exercise. A witness can be compelled to give evidence both of the facts he had observed and of his opinion of those facts. If the witness cannot be compelled to give evidence, the material facts could effectively be concealed

from the court by the simple expedient of recording them in a document created for the purposes of litigation.

[33] In *Harmony Shipping Co SA v Davis and others* [1979] 3 All ER 177 (CA), the Court of Appeal was called upon to consider a question of principle: If an expert witness has been consulted by one side and has given his opinion to that side, can he thereafter be consulted and subpoenaed by the other side to give his opinion on the facts of the case? In that case, a handwriting expert was approached by the plaintiffs in an action to advise on the authenticity of a document, the genuineness of which was crucial to their case. The expert advised that the document was not genuine. Subsequently, the expert was approached by the defendants to the action to advise them of the document's authenticity. Not realising that he had already advised the plaintiffs on the matter, he advised the defendants that the document was not genuine. He later realised that he had advised both sides and told the defendants that he could accept no further instructions from them. The defendants, who wished the expert to give evidence on their behalf, issued a subpoena ad testificandum requiring him to testify. The plaintiffs applied to set aside the subpoena but the trial judge ruled that the expert was a compellable witness and ought to give evidence as to his opinion of the document. The plaintiffs appealed, contending that there was a contract, express or implied, between them and the expert that he would not voluntarily assist the defendants on matters on which he had advised them and would use his best endeavours not to appeal for both sides. The Court of Appeal dismissed the plaintiffs' appeal on the principal ground that there is no property in a witness. At pp 180–181 of the judgment, Denning MR speaking for the Court of Appeal said:

> So far as witnesses of fact are concerned, the law is as plain as can be. There is no property in a witness. The reason is because the court has a right to every man's evidence. Its primary duty is to ascertain the truth. Neither one side nor the other can debar the court from ascertaining the truth either by seeing a witness beforehand or by purchasing his evidence or by making communication to him. In no way can one side prohibit the other side from seeing a witness of fact, from getting the facts from him and from calling him to give evidence or from issuing hi with a subpoena.
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> ...
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> That principle is established in the case of a witness of fact: for the plain, simple reason that the primary duty of the court is to ascertain the truth by the best evidence available. Any witness who has seen the facts or who knows the facts can be compelled to assist the court by giving that evidence.
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> Subject to that qualification (communications between the expert witness and the lawyer cannot be given in evidence to the court), it seems to me that an expert witness falls into the same position as a witness of fact. (Words in parentheses supplied).

[34] Accordingly, we hold that the appellant is precluded from relying on litigation privilege as there is no statutory basis for the invocation of litigation privilege at common law. As the preliminary question has been answered in the negative, we will now consider whether the respondent has satisfied the conditions adverted to in para 23 above.

[35] On the facts as disclosed in the affidavit evidence, we are satisfied that the respondent could not have with any reasonable diligence obtained the said documents prior to judgment in view of the position taken by the appellant. Prior to judgment, the appellant had created the clear impression that there was no detailed survey plan. Further, notwithstanding the appellant's unequivocal stand that it could not identify the persons it supplied electricity to, the appellant had in fact produced a list of 62 squatters in the squatter action that it admits to having supplied electricity to. We are also satisfied that the detailed survey plan, the list of documents and the affidavit verifying list of documents are if true, would have or would have been likely to have had a determining influence upon the decision of the High Court.

[36] We are also inclined to agree with the submission of learned counsel for the respondent that in all the circumstances the appellant had for all intents and purposes suppressed the existence of the detailed survey plan and the names of the squatters supplied with electricity from the High Court. In the circumstances, the court would favour a more liberal approach to the adducing of the new evidence.

[37] In *Hamilton v Brodie Brittain Racing Ltd*, the English Court of Appeal summarised the position taken by the House of Lords in *Skone v Skone and another* and *Linton v Ministry of Defence* as follows:

> Nonetheless, in my judgment, the speeches, both of Lord Hodson and Lord Scarman support my view that in cases of deception or impropriety or fraud, condition 1 is to be considered with a greater degree of flexibility than cases in which such serious allegations are not raised, and too strict an adherence to those important guidelines in *Ladd v Marshall* should not inhibit a consideration by the court of the justice of the case.

[38] In *Skone*, the husband filed a divorce petition against his wife on the grounds of her adultery. The husband's solicitors received a letter from the co-respondent's solicitors informing that there were no documents to disclose adultery. The petition was ultimately dismissed. Subsequent to the dismissal of the petition, evidence came to light in the form of love letters, which were in the possession of the wife, which tended to show that there was in fact adultery. Of particular relevance to this motion, the House of Lords stated the following:

> This case is, I think, a special one in the sense that not only had the husband no

reason to suspect the existence of incriminating letters in the possession of either the wife or the co-respondent but also his solicitors had been informed by letter from the co-respondent's solicitors that he had no documents to disclose on discovery. This produced in effect an agreement to dispense with a discovery order under RSC Ord 24 which applies to matrimonial proceedings ... notwithstanding the failure to obtain an order for discovery, in the circumstances I would not for this reason disqualify the husband.

[39] For the foregoing reasons encl 37a is allowed with costs.

Enclosure 37a allowed with costs.

Reported by Dzulqarnain Ab Fatar